Special Commission on the Recognition and Enforcement of Foreign Judgments (16-24 February 2017)

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Draft General and Final Clauses

proposed by the Permanent Bureau

Introduction

1. The second meeting of the Special Commission on the recognition and enforcement of foreign judgments, to be held in February 2017, will, amongst other matters, have to discuss in some detail the General and Final Clauses of the future Convention. This document is designed to facilitate these discussions.

2. At the outset, it is important to recall that the future Judgments Convention is intended to sit alongside, and complement, the *Convention of 30 June 2005 on Choice of Court Agreements* ("2005 Choice of Court Convention").[1] The approach adopted in this paper thus is that, where relevant, the General and Final Clauses of the future Convention follow as closely as possible the wording used in corresponding articles of the 2005 Choice of Court Convention – unless there are clear reasons to the contrary. Where appropriate, other drafting models used in previous Hague Conventions are referenced.

3. Depending on the outcome of the discussions at the Special Commission meeting, the proposed provisions may have to be amended and new provisions may have to be drafted by the Drafting Committee or a Sub-Committee on General and Final Clauses. The following proposals are not meant to cover all possible approaches that may be taken in relation to these clauses. This applies in particular to the *final* clauses (Chapter Y).

Chapter X – GENERAL CLAUSES[2]

Transitional provisions[3]

4. Transitional provisions do not determine when the Convention enters into force for a State (this question is addressed below, see the proposal for Art. 29). Rather, in the context of the future Judgments Convention, these provisions will establish one or more criteria to determine at what moment in time of the proceedings the Convention needs to be in force in the State of origin and in the requested State for the Convention to apply to the recognition and enforcement of the relevant judgment.

5. The transitional regime of the 2005 Choice of Court Convention uses two criteria.[4] For the proceedings in the State of the chosen court, the decisive moment is the *conclusion of the exclusive choice of court agreement* (Art. 16(1)). Under this rule, the Convention applies if and when the exclusive choice of court agreement has been concluded *after the Convention came into force for the State of the chosen court*. The date of commencement of the proceedings is irrelevant, as is the date of the actual judgment. However, for proceedings in Contracting States other than that of the chosen court (Art. 6), and for the recognition and enforcement of a judgment rendered by the chosen court in another Contracting State (Chapter III), an additional criterion must be fulfilled: the Convention only applies to procedures instituted after the entry into force of the Convention for these States (Art. 16(2)). This transitional regime is very specific to the 2005 Choice of Court Convention and cannot be transposed as such in the future Judgments Convention.

6. The 2016 preliminary draft Convention is designed only to operate as between *two Contracting States* (see Arts 1(2) and 4(1)). The question then becomes at what moment in time the two States need to be a party to the Convention for the latter to apply to the recognition

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[1] Aide Memoire of the Chair of the Special Commission of June 2016, available on the Secure Portal of the Hague Conference website, para. 7.

[2] This is the terminology used in the 2005 Choice of Court Convention and some other previous Hague Conventions. Other recent Hague Conventions use the expression "General Provisions" (see *e.g.*, the 2007 Child Support Convention, 2006 Securities Convention, 2000 Adults Convention, 1996 Child Protection Convention, 1993 Intercountry Adoption Convention, etc.). Yet some other Conventions use the term "Miscellaneous Provisions". In line with the approach adopted in this paper, the Permanent Bureau suggests to match the wording of the 2005 Choice of Court Convention; it is further noted that the heading "General provisions" is already used in Art. 4 of the 2016 preliminary draft Convention.

[3] While in some Hague Conventions the transitional provisions form a separate Chapter (see the 2006 Securities Convention), in most Conventions they are part of the General Clauses / Provisions.

[4] T. Hartley and M. Dogauchi, "Explanatory Report on the 2005 Hague Choice of Court Convention", in *Proceedings of the Twentieth Session (2005)*, Tome III, *Choice of Court*, Antwerp-Oxford-Portland, Intersentia, 2010, paras 218-19 [hereinafter, "Hartley / Dogauchi Report"].

and enforcement of the relevant judgment. In particular, is it enough for the Convention to be in force in the State of origin at the time the judgment is rendered or must the Convention *also* be in force, at the time of the judgment, in the State in which recognition and enforcement is subsequently sought? These two approaches are reflected below in Variants A and B respectively.

7. Variant A provides that the Convention will (only) apply to judgments rendered after the entry into force of the Convention both in the State of origin *and* in the requested State. Under this variant, for the Convention to apply, both the State of origin and the requested State have to be Parties to the Convention on the date the judgment is rendered.

Article 17 – Variant A
Transitional provisions

This Convention shall apply to the recognition and enforcement of judgments rendered[5] after its entry into force for the State of origin and the requested State.

8. Variant B takes a more flexible approach. Under this variant, the Convention would apply to judgments rendered in the State of origin after the Convention came into force for that State, and recognition and enforcement of the judgment is sought in the requested State after the entry into force of the Convention for that latter State. This variant thus uses two different criteria: for the State of origin, the date on which the judgment is rendered is decisive, whereas for the requested State the date on which recognition and enforcement is sought is decisive.

Article 17 – Variant B
Transitional provisions

This Convention shall apply to the recognition and enforcement of judgments –

a) rendered[6] after its entry into force for the State of origin; and

b) for which recognition and enforcement is sought after its entry into force for the requested State.

9. Under both these variants, it would also be possible to require that the Convention be in force in the State of origin when the *proceedings are instituted* in that State (as opposed to the date of the judgment). This would somewhat restrict, perhaps unduly so, the scope of application of the Convention. In terms of legal certainty and predictability, the criterion chosen in Variants A and B (date of the judgment) does not seem to raise critical concerns for the relevant parties; the fact that the Convention would enter into force for the State of origin in the course of the proceedings in that State would merely provide a variant for the subsequent recognition and enforcement of the judgment abroad under the Convention.

10. Similarly, if the Convention also applies in situations where it entered into force in the requested State after the judgment has been rendered in the State of origin but before recognition and execution is sought in the requested State, the scope of the Convention would be (slightly) broader and the circulation of judgments promoted to a greater extent.

11. Under Variant C, the Convention shall apply to judgments for which recognition and enforcement is sought after its entry into force in the State of origin and the requested State. In this variant, the only relevant criterion is that the Convention is in force in both States when exequatur is sought. The rationale behind this variant is that, if the date when proceedings are instituted in the State of origin is irrelevant, there may not be a policy argument to look at the moment when the judgment was rendered. From the point of view of the parties, it may not make a difference that the Convention entered into force in the State of origin the day before the judgment was rendered. This said, with a view to avoiding any doubts, under Variant C it

[5] Arts 3 and 4 of the 2016 preliminary draft Convention use "given" instead of "rendered". This terminology should be aligned once the Special Commission decides which verb is preferred.
[6] *Ibid*.

would be particularly important for the Explanatory Report to clarify that the Convention may have entered into force on different dates in each State (something that would follow from the text of Variant B, but not necessarily from Variant C).

Article 17 – Variant C
Transitional provisions

This Convention shall apply to the recognition and enforcement of judgments for which recognition and enforcement is sought after the Convention has entered into force [in] [between] the State of origin and the requested State.

12. Under Variant D, the Convention shall apply to the recognition and enforcement of judgments if the proceedings were instituted after its entry into force in the State of origin, and if the judgment was rendered after the entry into force of the Convention in the requested State. The rationale behind this variant is that the Convention requires the defendant to adopt a certain behaviour during the proceedings, even before the judgment is rendered. For example, the provision on "entering an appearance" requires the defendant to contest jurisdiction if he would have had an arguable case that there was no jurisdiction. If we focus only on the time when judgment was rendered, the case may arise where the defendant did not contest jurisdiction, because he rightly assumed during the proceedings that he had no reason to contest jurisdiction as the judgment would at that time in any case not be recognised in his country. Such a judgment should not later be recognised in the State addressed, because at the time the proceedings were instituted the defendant had no reason to contest jurisdiction in the State of origin.

Article 17 – Variant D
Transitional provisions

This Convention shall apply to the recognition and enforcement of judgments rendered after the entry into force for the State addressed if the proceedings were instituted after its entry into force for the State of origin.

13. Finally, under Variant E an even more cautious approach could be taken, which would require the Convention to be in force in both States at the time the proceedings in the State of origin were initiated (as that is the time at which one can make predictions about whether or not to defend the action based on the likelihood of the action being enforced in other States where the defendant has assets). Under this variant the applicability of the Convention would solely depend on the institution of the proceedings, as the provision on "entering an appearance" (Art. 5(1)(f) of the 2016 preliminary draft Convention, whose text is currently in square brackets) requires the defendant to contest jurisdiction if he or she would have had an arguable case that there was no jurisdiction.

Article 17 – Variant E
Transitional provisions

This Convention shall apply to the recognition and enforcement of judgments for which proceedings were instituted in the State of origin after the Convention has entered into force in the State of origin and if at that time the Convention was in force in the requested State.

No legalisation

14. This provision is drawn from Article 18 of the 2005 Choice of Court Convention.

Article 18
No legalisation

All documents forwarded or delivered under this Convention shall be exempt from legalisation or any analogous formality, including an Apostille.

Declarations with respect to specific matters or otherwise limiting recognition and enforcement under the Convention

The purpose of declarations

15. Individual Contracting States may require to make some opt-out declarations with regard to certain specific matters. It is however unlikely that they wish to exclude the operation of the Convention in "wholly domestic matters", as Article 20 of the 2005 Choice of Court Convention foresees. Such an option does not appear to be necessary as the jurisdictional filters of the future Judgments Convention are designed to provide sufficient assurance that only judgments given by a "proper forum" will be recognised and enforced in another State.

16. Furthermore, a declaration mechanism could possibly also address the question of exclusive jurisdictions not covered by Article 6 of the 2016 preliminary draft Convention, which several Members raised during the first meeting of the Special Commission.

Declarations with respect to specific matters

17. The proposed Article 19, drawn from Article 21 of the 2005 Choice of Court Convention, will operate on the basis of reciprocity, *i.e.*, other Contracting States shall not be bound to recognise or enforce a judgment from the State that made the declaration and which relates to that specific matter.

Article 19
Declarations with respect to specific matters

1. Where a State has a strong interest in not applying this Convention to a specific matter, that State may declare that its courts will refuse to recognise or enforce a judgment [relating to] [on] that matter. The State making such a declaration shall ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined.

2. With regard to that matter, the Convention shall not apply –

a) in the Contracting State that made the declaration;

b) in other Contracting States, where recognition or enforcement of a judgment given in a Contracting State that made the declaration is sought.

Number of declarations

18. In the course of informal consultations, it has been suggested that one way to limit the use of this provision might be to introduce a limitation on the number of declarations a State can make. If this suggestion were to be followed, it would constitute a novelty in the context of the Conventions negotiated in the framework of the Hague Conference or even perhaps in contemporary treaty law practice.

Article 19
Declarations with respect to specific matters (cont'd)

3. No more than [X] such declarations may be made by a Contracting State.

Uniform interpretation

19. This provision is drawn from Article 23 of the 2005 Choice of Court Convention, in line with a longstanding tradition of Hague Conventions and other instruments.

Article 20 *Uniform interpretation* In the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application.

Review of operation of the Convention

20. The purpose of this proposed provision is to allow for a periodic review of the practical operation of the Convention. In particular, it is recommended that the operation of any declarations made under the Convention is periodically reviewed, with a view to determine whether any of them is still needed.[7]

21. In line with Article 24 of the 2005 Choice of Court Convention, the proposed provision includes a reference to the possibility for a Special Commission meeting to consider any possible *amendments* to the Convention. While it is understood that amendments may raise questions as to which version of the Convention may apply between States, the absence of any reference to a possible venue to consider amendments might be understood as specifically excluding any such consideration at a Special Commission meeting (which might be too rigid an approach). This being said, questions relating to the possible need to amend a Hague Convention or related instrument may always be brought to the consideration of the Council on General Affairs and Policy of the Hague Conference (the Council). The Council could task the Permanent Bureau to explore alternative review mechanisms for Conventions negotiated in the framework of the Hague Conference.

Article 21 *Review of operation of the Convention* The Secretary General of the Hague Conference on Private International Law shall at regular intervals make arrangements for – *a)* review of the operation of this Convention, including any declarations; and *b)* consideration of whether any amendments to this Convention are desirable.

Non-unified legal systems

22. This provision is drawn from Article 25 of the 2005 Choice of Court Convention.[8] A possible addition in line with Article 28 of the 1973 Maintenance Obligations (Enforcement) Convention is included in square brackets.

Article 22 *Non-unified legal systems* 1. In relation to a Contracting State in which two or more systems of law [in relation to the recognition and enforcement of judgments] apply in different territorial units with regard to any matter dealt with in this Convention –

[7] See Hartley / Dogauchi Report, para. 257.

[8] See Hartley / Dogauchi Report, para. 258-264. It is noted that the 2006 Securities Convention uses the term "multi-unit State" (Art. 12) to refer to States where non-unified legal systems co-exist. This approach required a definition of a "multi-unit State" (see Art. 1(1)(m) of the 2006 Securities Convention). It is not suggested to follow the model of the 2006 Securities Convention in the future Convention.

a) any reference to the law or procedure of a State shall be construed as referring, where appropriate, to the law or procedure in force in the relevant territorial unit;

b) any reference to the court or courts of a State shall be construed as referring, where appropriate, to the court or courts in the relevant territorial unit;

c) any reference to a connection with a State (residence, habitual residence, etc) shall be construed as referring, where appropriate, to a connection with the relevant territorial unit.

2. Notwithstanding the preceding paragraph, a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to apply this Convention to situations which involve solely such different territorial units.

3. A court in a territorial unit of a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to recognise or enforce a judgment from another Contracting State solely because the judgment has been recognised or enforced in another territorial unit of the same Contracting State under this Convention.

4. This Article shall not apply to a Regional Economic Integration Organisation.

Relationship with other international instruments

Introduction

23. The proposed Article 23, which addresses the relationship of the future Convention with other international instruments, is based on Article 26 of the 2005 Choice of Court Convention.[9] The proposed provisions have been slightly adjusted to take into account the specific rules of the future Convention but, for the time being, they reproduce all six paragraphs of Article 26.

24. Paragraph 1 provides that the future Convention must be interpreted, as far as possible, to be compatible with other treaties in force for Contracting States. Paragraphs 2 to 6 provide articulation rules for the future Convention and other binding international instruments on recognition and enforcement of judgments ("give-way" rules).

Article 23
Relationship with other international instruments

1. This Convention shall be interpreted so far as possible to be compatible with other treaties in force for Contracting States, whether concluded before or after this Convention.

2. This Convention shall not affect the application by a Contracting State of a treaty, whether concluded before or after this Convention, in cases where none of the parties is resident in a Contracting State that is not a Party to the treaty.

3. This Convention shall not affect the application by a Contracting State of a treaty that was concluded before this Convention entered into force for that Contracting State, if applying this Convention would be inconsistent with the obligations of that Contracting State to any non-Contracting State. This paragraph shall also apply to treaties that revise or replace a treaty concluded before this Convention entered into force for that Contracting State, except to the extent that the revision or replacement creates new inconsistencies with this Convention.

4. This Convention shall not affect the application by a Contracting State of a treaty, whether concluded before or after this Convention, for the purposes of obtaining recognition or enforcement of a judgment given by a court of a Contracting State that is also a Party to that treaty. However, the judgment shall not be recognised or enforced to a lesser extent than under this Convention.

[9] See the detailed explanations as well as the helpful illustrations included in the Hartley / Dogauchi Report, paras 265-310.

5. This Convention shall not affect the application by a Contracting State of a treaty which, in relation to a specific matter, governs the recognition or enforcement of judgments, even if concluded after this Convention and even if all States concerned are Parties to this Convention. This paragraph shall apply only if the Contracting State has made a declaration in respect of the treaty under this paragraph. In the case of such a declaration and to the extent that any inconsistencies exist between the above-mentioned treaty and this Convention, other Contracting States shall not be obliged to apply this Convention to a judgment which relates to that specific matter and which was rendered by a court of a Contracting State that made the declaration.

6. This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention, whether adopted before or after this Convention –

a) where none of the parties is habitually resident in a Contracting State that is not a Member State of the Regional Economic Integration Organisation;

b) as concerns the recognition or enforcement of judgments as between Member States of the Regional Economic Integration Organisation.

25. The Permanent Bureau was asked to draw up a separate paper on the relationship between the 2005 Choice of Court Convention and the future Convention (to be circulated in January 2017). The proposed provision (see box below) should accommodate any additional rule dealing with the co-ordination of the relations between these two Conventions.

Chapter Y – FINAL CLAUSES[10]

Signature, ratification, acceptance, approval or accession[11]

26. Generally speaking, Hague Conventions distinguish two basic mechanisms through which a State may become a Party. The first mechanism differentiates between two steps: in a first step, a State *signs* the Convention and then, in a second step, the State deposits an instrument of *ratification*, *acceptance* or *approval* (in practice, both steps may be completed at the same time). The second mechanism consists of a single step, through which a State joins a Convention by depositing an instrument of *accession*.

27. Under most of the older Hague Conventions, only *Member States* may use the two-step process. This changed with the 2006 Securities and the 2005 Choice of Court Conventions – under both these Conventions, *any* State may sign and then ratify / accept / approve the Convention. In addition, both Conventions are also open for accession by all States. The 2007 Child Support Convention, however, adopted a different mechanism, under which the two-step process may be used by States which were Members at the time of the Diplomatic Session *and* by the other States which participated in that Session (the same or a similar system had been used in previous Conventions, such as the 1993 Intercountry Adoption Convention).

28. The recent Hague Conventions also provide for Regional Economic Integration Organisations (REIOs) to become a Party. Under the 2006 Securities, 2005 Choice of Court and 2007 Child Support Conventions, REIOs may sign and subsequently accept or approve (but not ratify) the Convention, or they may accede to the Convention (see further below, under REIOs).

29. Independently of the mechanism used, there is no difference in how a Convention eventually operates in a Contracting State. However, there typically is an important difference in the way the mechanisms establish *treaty relations among Contracting States*. A signature followed by a ratification / acceptance / approval is not subject to an acceptance or the absence

[10] Most recent Hague Conventions use the expression "Final Clauses", with the exception of the 2007 Child Support Convention, which uses the expression "Final Provisions".

[11] Exceptionally, and so as to adequately take into account the many aspects that this subject matter raises, this section is not predominantly based on the model offered by the 2005 Choice of Court Convention. Instead, it takes a slightly different approach by considering several Hague Conventions and raising some general policy questions.

of an objection by other Contracting States to establish treaty relations with them. An *accession,* on the other hand, typically only establishes a treaty relationship with another Contracting State if that other State does not object to the accession within a certain time (see, for example, Art. 32 of the 1980 Access to Justice Convention or Art. 58(3) of the 1996 Child Protection Convention), or if the other Contracting State expressly accepts the accession (see, for example, Art. 38 of the 1980 Child Abduction Convention).[12, 13]

30. The 1971 Judgments Convention established a unique system under which the recognition of decisions from another Contracting State was subject to the two Contracting States *also* concluding a Supplementary Agreement to this effect. This complex, multi-tiered system is generally seen as one of the reasons why this Convention had a limited success. The Permanent Bureau recommends not to consider this particular system for the future Convention.

31. However, States may wish to discuss the possibility of inserting a novel system in the Convention, under which (even) a *ratification / acceptance / approval* of the Convention would only establish a treaty relationship with any other Contracting State if that other State either accepts the *ratification / acceptance / approval* or refrains from objecting to it (depending on which of these two systems would be implemented). Under either system, even amongst two ratifying States – and even amongst two ratifying *Member States* – a treaty relationship would only be established if both Contracting States either explicitly or implicitly "agree and confirm" such a relationship. Such a system would allow for a very high degree of flexibility and thus might encourage States, which otherwise may not be inclined to do so, to actively consider becoming a Party to the Convention. Furthermore, each State would join the Convention with the assurance that it stays in control as to its partners under the treaty. This may encourage States to join the Convention sooner rather than later.

32. If such a "bilateralisation clause" would require each Contracting State to expressly *approve* the other State's joining, the downside might be that such an approval process may take time (which inevitably delays the application of the Convention, as experience under the 1970 Evidence, 1980 Child Abduction, 1996 Child Protection or 2007 Child Support Conventions shows). This risk would not exist if the "bilateralisation clause" would require that a Contracting State expressly *objects* to another State's *ratification / acceptance / approval* if it does not wish to have treaty relations with that other State. On the other hand, such a system would require States to be very alert in following the status of the Convention and object on time if they wish to do so (on this point, see Art. 28 below and related comments).

33. For discussion purposes, it is recommended that delegations consider the following questions about the "openness" of the future Convention:

1. Should the future Judgments Convention be a "fully open" Convention, *i.e.* open to any State and Member REIO by any means of joining (*i.e.*, by ratification, acceptance, approval or accession)?
2. If so, should treaty relations "automatically" be established between all Contracting States (*i.e.*, a Contracting State would not have the possibility to decide, by way of confirmation or objection, whether or not it has treaty relations with another Contracting State)? Or should the "automatic" establishment of treaty relations only operate between Member States (and Members) of the Hague Conference? And if the latter applies, should the rule further be qualified so that it only applies to Member States (and Members) at the time of the Diplomatic Session during which the Convention was adopted?
3. If treaty relations are not established "automatically", what should the mechanism be to establish such treaty relations (confirmation or objection)? Should that mechanism apply to acceding States only or to all Contracting States, whatever mechanism they used to become a Party? And which States get to confirm or object

[12] There are a few other Hague Conventions where accession leads to treaty relations without further formalities or conditions (examples of such "open accessions" include the 2006 Securities and the 2005 Choice of Court Conventions).

[13] A rather unique way in which treaty relations are established is the so-called "veto" system (used, for instance, in Art. 28 of the 1965 Service Convention), under which one ratifying State may block the establishment of treaty relations between the acceding State and *any* other Contracting State. The Permanent Bureau is of the view that this rather draconian system should not be further considered so as to facilitate widespread effects to the future Convention.

(the State that joined first, the State that joined after, or both cumulatively need to confirm their treaty relationship)?

34. The following proposals do not cater for all possible options described above and all their permutations. At this stage, the suggested starting point is a basic proposal for an "open" Convention, modelled after Article 27 of the 2005 Choice of Court Convention,[14] and a "declaration mechanism" (in the form of either an objection or confirmation of acceptance) to enable a State to determine with which other States it wants to have a treaty relation. Any other or additional provisions in this respect would have to be drafted by the Drafting Committee or Sub-Committee in light of the discussions at the Special Commission meeting.

Article 24
Signature, ratification, acceptance, approval or accession

1. The Convention is open for signature by all States.

2. This Convention is subject to ratification, acceptance or approval by the signatory States.

3. This Convention is open for accession by all States.

4. Instruments of ratification, acceptance, approval or accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

Article 25
Declaration to confirm treaty relations or to object to them

1. (Variant A) This Convention shall only have effect between any two Contracting States if and when both States have each notified a declaration confirming the establishment of treaty relations under the Convention.

1. (Variant B) This Convention shall have effect between any two Contracting States unless either of the two States has notified an objection to the establishment of treaty relations under the Convention with the other Contracting State. Such an objection may only be filed before the entry into force of the Convention for the later ratifying, accepting, approving or acceding State.

2. Each Contracting State shall notify its [declarations confirming the establishment of treaty relations under the Convention with other Contracting States] [objections to the establishment of treaty relations under the Convention with other Contracting States] to the depositary. A Contracting State may withdraw or modify a declaration at any time.

3. The depositary shall circulate all [declarations] [objections] received to all Contracting States [and to the Members of the Hague Conference on Private International Law]. The Permanent Bureau shall reflect the information relating to [declarations] [objections] on the Hague Conference website.

Declarations with respect to non-unified legal systems

35. This provision is drawn from Article 28 of the 2005 Choice of Court Convention.

[14] See also Art. 17 of the 2006 Securities Convention.

Article 26
Declarations with respect to non-unified legal systems

1. If a State has two or more territorial units in which different systems of law apply in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that the Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

2. A declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.

3. If a State makes no declaration under this Article, the Convention shall extend to all territorial units of that State.

4. This Article shall not apply to a Regional Economic Integration Organisation.

***Regional Economic Integration Organisations* (REIOs)**

36. As the repartition of competences between an REIO and the States that constitute it may be specific to each REIO, the following provisions address two possibilities in line with the corresponding provisions of the 2005 Choice of Court Convention. The proposed Article 27 below refers to the situation where the REIO and its Member States become Parties to the future Convention, while the proposed Article 28 is concerned with the situation where the REIO alone becomes a Party.

Article 27
Regional Economic Integration Organisations

1. A Regional Economic Integration Organisation which is constituted solely by sovereign States and has competence over some or all of the matters governed by this Convention may similarly sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that the Organisation has competence over matters governed by this Convention.

2. The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, notify the depositary in writing of the matters governed by this Convention in respect of which competence has been transferred to that Organisation by its Member States. The Organisation shall promptly notify the depositary in writing of any changes to its competence as specified in the most recent notice given under this paragraph.

3. For the purposes of the entry into force of this Convention, any instrument deposited by a Regional Economic Integration Organisation shall not be counted unless the Regional Economic Integration Organisation declares in accordance with Article 28 paragraph 1 that its Member States will not be Parties to this Convention.

4. Any reference to a "Contracting State" or "State" in this Convention shall apply equally, where appropriate, to a Regional Economic Integration Organisation that is a Party to it.

Article 28
Accession by a Regional Economic Integration Organisation without its Member States

1. At the time of signature, acceptance, approval or accession, a Regional Economic Integration Organisation may declare that it exercises competence over all the matters governed by this Convention and that its Member States will not be Parties to this Convention but shall be bound by virtue of the signature, acceptance, approval or accession of the Organisation.

2. In the event that a declaration is made by a Regional Economic Integration Organisation in accordance with paragraph 1, any reference to a "Contracting State" or "State" in this Convention shall apply equally to the Member States of the Organisation.

Entry into force

37. This provision has two functions. First, it determines when the Convention will enter into force on the *international plane*. If the model of the 2005 Choice of Court Convention (and the 2007 Child Support Convention) is followed, *two* ratifications, acceptances, approvals or accessions would be enough to bring the Convention into force. It is recalled that previously at least *three* ratifications, acceptances, approvals or accessions were required to bring a Hague Convention into effect.

38. Secondly, the provision determines when the Convention enters into force *for any State or REIO* that subsequently ratifies, accepts, approves or accedes to it (or any territorial unit to which the Convention has been extended).

39. The proposed Article 29 offers two options for the time that needs to pass before the Convention enters into force for a Contracting State or REIO (three or six months). It is suggested that if the Convention will contain the possibility for Contracting States to object to the ratification, acceptance, approval or accession of other Contracting States, the longer period of *six months* would be more appropriate.

Article 29
Entry into force

1. This Convention shall enter into force on the first day of the month following the expiration of [three] [six] months after the deposit of the second instrument of ratification, acceptance, approval or accession referred to in Article 24.

2. Thereafter this Convention shall enter into force –

a) for each State or Regional Economic Integration Organisation subsequently ratifying, accepting, approving or acceding to it, on the first day of the month following the expiration of [three][six] months after the deposit of its instrument of ratification, acceptance, approval or accession;

b) for a territorial unit to which this Convention has been extended in accordance with Article 28 on the first day of the month following the expiration of [three] [six] months after the notification of the declaration referred to in that Article.

Reservations

40. The 2005 Choice of Court Convention is silent on the issue of reservations, which means that reservations are permitted subject to the normal rules of customary international law and Articles 19 to 23 of the 1969 *Vienna Convention on the Law of Treaties*.[15]

Variant A
No article on reservations

An explanation could be included in the Explanatory Report along the lines of paragraph 319 of the Hartley / Dogauchi Report, as follows: "It is the understanding of this Commission that no reservation should be encouraged in any way and that whenever a State wants to make a reservation – it should be made only if a State has a strong interest to do so; it should be no broader than necessary and be defined clearly and precisely; it should not deal with a specific matter that can be the object of a declaration; and it should not be detrimental to the object and purpose and to the coherence of the Convention."

[15] See Hartley / Dogauchi Report, paras 318-319.

41. Other Hague Conventions have expressly stated that no reservations shall be permitted; the suggested provision (see box below) follows these precedents (Art. 40 of the 1993 Intercountry Adoption Convention, Art. 21 of the 2006 Securities Convention and Art. 27 of the 2007 Maintenance Obligations Protocol, among others).

Article 30 – Variant B
Reservations

No reservation to this Convention shall be permitted.

42. On the other hand, to increase the likelihood that more Members ratify the future Convention the Special Commission may decide to allow reservations. In which case, the Special Commission may opt for a provision along the lines of Article 62(1) of the 2007 Child Support Convention, and namely:

Article 30 – Variant C
Reservations

Any Contracting State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article [ ], make one or more of the reservations provided for in Articles [ ]. No other reservation shall be permitted.

Declarations

43. The provision proposed below on procedures to be followed with regard to declarations is drawn from Article 32 of the 2005 Choice of Court Convention. The only exception is paragraph 4. Under the proposed paragraph 4, the time that needs to pass before a declaration shall take effect is significantly shorter. This change is necessary so as not to unduly undermine the time that States have to file a declaration in which they object to the establishment of a treaty relation with another Contracting State. This is another reason why the suggested time period of six months in Article 29(2) (in combination with Art. 25(1)) seems more appropriate. If the Convention does not provide for an objection mechanism (but rather the possibility to file a declaration of acceptance), the period of course could be shorter.

Article 31
Declarations

1. Declarations referred to in Articles 19, 23(5), 25, 26 and 28 may be made upon signature, ratification, acceptance, approval or accession or at any time thereafter, and may be modified or withdrawn at any time.

2. Declarations, modifications and withdrawals shall be notified to the depositary.

3. A declaration made at the time of signature, ratification, acceptance, approval or accession shall take effect simultaneously with the entry into force of this Convention for the State concerned.

4. A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall take effect on the first day of the month following the date on which the notification is received by the depositary.

5. A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall not apply to judgments rendered before it takes effect.

Denunciation

44. This provision is drawn from Article 33 of the 2005 Choice of Court Convention.

Article 32
Denunciation

1. This Convention may be denounced by notification in writing to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.

2. The denunciation shall take effect on the first day of the month following the expiration of twelve months after the date on which the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the date on which the notification is received by the depositary.

Notifications by the depositary

45. This provision is drawn from Article 34 of the 2005 Choice of Court Convention.

Article 33
Notifications by the depositary

The depositary shall notify the Members of the Hague Conference on Private International Law, and other States and Regional Economic Integration Organisations which have signed, ratified, accepted, approved or acceded in accordance with the Convention of the following –

a) the signatures, ratifications, acceptances, approvals and accessions referred to in Article 24;

b) the date on which this Convention enters into force in accordance with Article 29;

c) the notifications, declarations, modifications and withdrawals of declarations referred to in Article 31; and

d) the denunciations referred to in Article 32.